

UNITED STATES OF AMERICA,

V.

Defendants.

CONSENT DECREE

TABLE OF CONTENTS

I.	<u>JURISDICTION AND VENUE</u>	2
II.	<u>DEFINITIONS</u>	2
III.	<u>APPLICABILITY</u>	4
IV.	<u>INJUNCTIVE RELIEF</u>	5
V.	<u>REPORTING</u>	9
VI.	<u>CIVIL PENALTY</u>	12
VII.	<u>STIPULATED PENALTIES</u>	14
VIII.	<u>FORCE MAJEURE</u>	17
IX.	<u>DISPUTE RESOLUTION</u>	19
X.	<u>RIGHT OF ENTRY/RECORDS RETENTION</u>	21
XI.	<u>EFFECT OF DECREE</u>	23
XII.	<u>NON-WAIVER PROVISIONS</u>	24
XIII.	<u>COSTS OF SUIT</u>	25
XIV.	<u>MODIFICATION</u>	26
XV.	<u>PUBLIC COMMENT AND ENTRY OF CONSENT DECREE</u>	26
XVI.	<u>TERMINATION</u>	26
XVII.	<u>SIGNATORIES/SERVICE</u>	27
XVIII.	<u>INTEGRATION</u>	28
XIX.	<u>FINAL JUDGMENT</u>	28
XX.	<u>RETENTION OF JURISDICTION</u>	28
XXI.	<u>APPENDICES</u>	29

WHEREAS, Plaintiff, the United States of America, at the request of the Administrator of the United States Environmental Protection Agency ("EPA") and by authority of the Attorney General, filed a Complaint herein against Defendants McCulloch Corporation ("McCulloch"), Jenn Feng Industrial Corporation, Ltd. ("Jenn Feng"), MTD Southwest Inc and MTD Products Inc (together "MTD") alleging violations of the Clean Air Act (the "Act"), as amended, 42 U.S.C. § 7401 *et seq.*, and the regulations promulgated thereunder at 40 C.F.R. Part 90 ("Small Nonroad SI Regulations") arising from the manufacture and importation of a number of chainsaws powered by nonroad engines that were not covered by a Certificate of Conformity; and

WHEREAS, MTD approached EPA and informed it of the alleged violations at issue in this case, and the Defendants have cooperated with EPA and acted in good faith throughout this investigation and through the negotiations and development of mitigation projects;

WHEREAS, McCulloch has conducted confirmatory certification testing on certain 2007 Model Year engines; and

WHEREAS, by agreeing to entry of this Consent Decree, McCulloch, Jenn Feng and MTD (collectively, the "Defendants") make no admission of law or fact with respect to any of the allegations set forth in the Consent Decree or the Complaint filed herewith and deny any violation of any law or regulation identified herein;

WHEREAS, the United States and the Defendants have consented to entry of this Consent Decree without trial of any issues; and

WHEREAS, the United States and Defendants recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the United States and the Defendants in good faith, that implementation of this Consent Decree will avoid prolonged and

complicated litigation between the United States and the Defendants, and that this Consent Decree is fair, reasonable, and in the public interest;

NOW, THEREFORE, before the taking of any testimony, without the adjudication or admission of any issue of fact or law, and with the consent of the Parties, it is hereby ADJUDGED, ORDERED, AND DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action and the Parties pursuant to 28 U.S.C. §§ 1331, 1345, 1355, and Sections 203, 204, 205 and 213 of the Act, 42 U.S.C. §§ 7522, 7523, 7524 and 7547. Venue in this District is proper pursuant to Sections 204 and 205 of the Act, 42 U.S.C. § 7523 and 7524.

2. For purposes of this Consent Decree, the Defendants agree that the Complaint states claims upon which relief may be granted pursuant to Sections 203, 204, 205 and 213 of the Act, 42 U.S.C. §§ 7522, 7523, 7524, and 7547.

II. DEFINITIONS

3. Unless specifically defined in this Section or elsewhere in this Consent Decree, terms used in this Consent Decree shall have the meanings currently set forth in Sections 202, 216 and 302 of the Act, 42 U.S.C. §§ 7521, 7550, and 7602, and the regulations promulgated under Title II of the Act, 42 U.S.C. §§ 7521–7590.

a. “Act” means the Clean Air Act, as amended, 42 U.S.C. §§ 7401 *et seq.*

b. “Certificate of Conformity” means a certificate issued by EPA pursuant to Section 206 of the Act, 42 U.S.C. § 7525 and 40 C.F.R. § 90.108.

- c. "Consent Decree" or "Decree" means this document, including the Appendices.
- d. "Complaint" means the complaint filed by the United States in this action.
- e. "Day" means a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or Federal holiday, the period shall run until the close of business of the next working day.
- f. "Defendants" shall mean McCulloch, Jenn Feng, and MTD.
- g. "Effective Date" is the date the Consent Decree is approved by the Court.
- h. "Engine Family" means a group of engines, as specified in 40 C.F.R. § 90.116.
- i. "EPA" means the United States Environmental Protection Agency and any of its successor departments or agencies.
- j. "Interest" means interest at the rate allowed on money judgments pursuant to 28 U.S.C. § 1961. For the purposes of calculating interest under Paragraph 24 of this Consent Decree, interest shall begin to accrue on the date that is thirty (30) days after the Effective Date and such date shall be viewed as the "date of the entry of judgment" under 28 U.S.C. § 1961(a). For the purposes of calculating interest owed under Paragraphs 29 and 34 of this Consent Decree, interest shall begin to accrue on the date that is thirty (30) days from the day that EPA sends a demand for payment of stipulated penalties under Paragraph 32 of the Consent Decree and such date shall be viewed as the "date of entry of judgment" under 28 U.S.C. § 1961(a).
- k. "Model Year" means model year as defined in 40 C.F.R. § 90.3.
- l. "Paragraph" means a portion of this Consent Decree identified by an Arabic numeral.
- m. "Parties" means the United States, McCulloch, Jenn Feng and MTD, and each shall be a "Party." "MTD" shall mean MTD Southwest Inc and MTD Products Inc.

n. "Project Dollars" shall mean the Defendants' expenditures and payments incurred or made in carrying out the projects identified in Paragraph 14 of this Consent Decree (Mitigation Projects) to the extent that such expenditures or payments both: (a) comply with the Project Dollar and other requirements set by Paragraph 14 of this Consent Decree (Mitigation Projects) for such expenditures and payments; and (b) constitute the Defendants' documented external costs for contractors, vendors, as well as equipment, and its internal costs consisting of employee time, travel, and other out-of-pocket expenses specifically attributable to these particular projects. Notwithstanding the above, for MTD only, "Project Dollars" shall mean the number of units produced with low-permeable fuel lines pursuant to the Mitigation Project required by Paragraph 14 and Appendix G.

o. "Section" means a portion of this Consent Decree identified by a Roman numeral.

p. "Subject Chainsaws" means the 2005 and 2006 Model year 50cc and 55 cc chainsaws manufactured by McCulloch or Jenn Feng, and identified at Appendix A.

q. "United States" means the United States of America, acting on behalf of EPA.

III. APPLICABILITY

4. The obligations of this Consent Decree apply to and are binding upon the United States and upon the Defendants, their successors, and assigns, and upon their employees, contractors, and agents solely in their capacities as such. Unless approved by EPA in writing, any change in the Defendants' ownership or corporate status shall in no way alter their responsibilities under this Consent Decree.

5. Except as set forth in Paragraphs 8 through 12 of this Consent Decree, the obligations of the Defendants under this Consent Decree to make payments and to implement injunctive relief are joint and several obligations of McCulloch, Jenn Feng and MTD.

6. Defendants shall provide a copy of this Consent Decree to all officers, employees, and agents whose duties might reasonably include compliance with any provision of this Decree, as well as to any contractor retained to perform work required under this Consent Decree. Defendants shall include a condition with any such contract that performance of the work must be conducted in conformity with the terms of this Consent Decree.

7. In any action to enforce this Consent Decree, Defendants shall not raise as a defense the failure by any of their officers, directors, employees, agents, or contractors to take any actions necessary to comply with the provisions of this Consent Decree.

IV. INJUNCTIVE RELIEF

8. Export of Subject Chainsaws. MTD shall export the Subject Chainsaws identified in Appendix B in accordance with the MTD Export Plan set forth in Appendix B. MTD shall deliver these Subject Chainsaws to a freight forwarder for export within one-hundred eighty (180) days of the Effective Date of this Consent Decree, and cause the Subject Chainsaws to be exported to a country outside of North America within one-hundred eighty (180) days of the Effective Date of this Consent Decree.

9. McCulloch and Jenn Feng shall export the Subject Chainsaws identified in Appendix C to a country outside of North America in accordance with the McCulloch/Jenn Feng Export Plan set forth in Appendix C within one-hundred eighty (180) days of the Effective Date of this Consent Decree.

10. Nonroad Compliance Plans. Within ninety (90) days of the Effective Date of this Consent Decree, McCulloch and Jenn Feng shall adopt and implement a Nonroad Compliance Plan applicable to McCulloch and Jenn Feng in accordance with Appendix D.

11. Within ninety (90) days of the Effective date of this Consent Decree, MTD shall adopt and implement a Nonroad Compliance Plan applicable to MTD in accordance with Appendix E.

12. Emissions Testing. Within thirty (30) days after Effective Date of this Consent Decree, Jenn Feng and McCulloch shall complete emissions tests in accordance with the Test Plan set forth in Appendix F for three appropriately representative sample engines from each engine family or group of engine families identified below, and report the results of these emissions tests to the United States pursuant to Section V (Reporting). Upon written approval by EPA, Jenn Feng and McCulloch may use laboratories not otherwise listed in Appendix F to conduct the emissions tests.

5MHXS.0254AA and 6MHXS.0254AA
5MHXS.0294AB
5MHXS.0424AA and 6MHXS.0424AA
5MHXS.0555AA
6MHXS.0304AA
6MHXS.0354AA
6MHXS.0404AA
6MHXS.0555AA

13. If the average test results determined in accordance with Appendix F from any engine family or group of engine families identified above exceeds the applicable emissions

standards, the Defendants shall mitigate the excess emissions caused by these engines by calculating Additional Project Dollars in accordance with the formula set forth in Appendix G and by spending the Additional Project Dollars on Mitigation Projects described in Appendix G.

14. Mitigation Projects. The Defendants shall implement the Mitigation Projects ("Projects") described in Appendix G in compliance with the applicable schedules set forth in this Appendix. The Defendants shall maintain, and present to the United States upon request, all documents to substantiate the environmental benefits of the Projects and the Project Dollars expended, and shall provide these documents to the United States within thirty (30) days of a request by the United States for such documents. The Defendants shall use good faith efforts to secure as much environmental benefit as possible from the Projects, consistent with the applicable requirements and limits of this Consent Decree. If one Defendant is in default of its obligations set forth in Appendix G, that Defendant shall notify the other Parties. Any public statement, oral or written, in print, film, or other media, made by any Defendant making reference to the Mitigation Projects under this Decree shall include the following language: "This project was undertaken in connection with the settlement of an enforcement action, *United States v. McCulloch, et al.*, taken on behalf of the U.S. Environmental Protection Agency under the Clean Air Act."

15. Within sixty (60) days following the completion of each Mitigation Project required under this Consent Decree, the Defendants shall submit to the United States a report pursuant to Section V (Reporting) that documents the date that the Mitigation Project was completed, the results of implementing the Mitigation Project, including the emission reductions or other environmental benefits achieved, and the costs incurred by the Defendants in

implementing the Mitigation Project. With regard to the Mitigation Projects, Defendants shall certify the truth and accuracy of each of the following:

- a. that all cost information provided to EPA in connection with EPA's approval of the Mitigation Projects is complete and accurate;
- b. that, as of the date of executing this Decree, Defendants are not required to perform or develop any of the Mitigation Projects by any federal, state, or local law or regulation and are not required to perform or develop the Mitigation Projects by agreement, grant, or as injunctive relief awarded in any other action in any forum;
- c. that the Mitigation Projects are not projects that Defendants were planning or intending to construct, perform, or implement other than in settlement of the claims resolved in this Decree;
- d. that Defendants have not received and will not receive credit for the Mitigation Projects in any other enforcement action; and
- e. that Defendants will not receive any reimbursement for any portion of the Mitigation Projects from any person, other than another Defendant.

16. All plans and reports prepared by the Defendants pursuant to the requirements of this section of the Consent Decree shall be publicly available without charge. However, Defendants may assert that any part of these plans or reports are protected as Confidential Business Information ("CBI") under 40 C.F.R. Part 2. As to any information that Defendants seek to protect as CBI, Defendants shall follow the procedures set forth in 40 C.F.R. Part 2.

17. Beginning six months after the Effective Date of this Consent Decree, and continuing until all Projects are completed in accordance with this Decree, each Defendant shall provide the United States and the other Defendants with semi-annual updates concerning the

progress of, the environmental benefits and the costs incurred in implementing the Mitigation Projects identified in Appendix G.

V. REPORTING

18. Each notice, submission, or report required by this Consent Decree shall be accompanied by a transmittal letter referencing the appropriate Paragraph of this Consent Decree. The Defendants, through duly authorized representatives having knowledge of the contents of the notice, submission, or report, shall sign and certify under 28 U.S.C. § 1746 as follows:

I certify under penalty of law that I have examined and am familiar with the information submitted in this document and all attachments and that this document and its attachments were prepared either by me personally or under my direction or supervision in a manner designed to ensure that qualified and knowledgeable personnel properly gathered and presented the information contained therein. I further certify, based on my personal knowledge or on my inquiry of those individuals immediately responsible for obtaining the information, that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing and willful submission of a materially false statement.

The Defendants shall not object to the admissibility in evidence of any such reports in a proceeding to enforce this Consent Decree.

19. Compliance with the reporting and notification requirements of this Consent Decree shall not relieve the Defendants of their obligations to comply with any other reporting or notification requirements imposed by any current or future federal, state, or local laws, regulations, or permits. Nothing contained in this Consent Decree is intended to waive or modify any requirement to submit reports or notifications to the United States or EPA as required by any statute, regulation, or other law or provision.

20. Unless otherwise provided herein, reports, submissions, notifications to, or communications with the United States or the Defendants shall be deemed submitted on the date they are postmarked and sent by first class mail, overnight receipt mail service, or by certified or registered mail, return receipt requested. Except as otherwise specifically provided herein, when written notification to or communication with the United States, EPA or the Defendants is required by the terms of this Consent Decree, it shall be addressed as follows:

As to the United States and EPA:

Chief
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611, Ben Franklin Station
Washington D.C. 20044-7611
Re: DOJ No. 90-5-2-1-09103

Director
Air Enforcement Division (2242A)
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Ariel Rios Building South
Washington, D.C. 20004

Jeffrey A. Kodish, Esq.
Office of Enforcement and Compliance Assurance
Mobile Sources Enforcement Branch
Western Field Office (8MSU)
U.S. Environmental Protection Agency
1595 Wynkoop Street
Denver, CO 80202

Director
Compliance and Innovative Strategies Division (6403J)
Office of Transportation and Air Quality
Office of Air and Radiation

U.S. Environmental Protection Agency
1310 L Street, N.W.
Washington, D.C. 20004

Manager
Heavy Duty and Nonroad Engine Group (6405J)
Compliance and Innovative Strategies Division
Office of Transportation and Air Quality
U.S. Environmental Protection Agency
1200 Pennsylvania Ave, NW
Mailcode 6405J
Washington, DC 20460

As to The Defendants:

Francis X. Lyons, Esq.
Bell, Boyd & Lloyd LLP
70 West Madison Street
Suite 3300
Chicago, Illinois 60602

David Jong
Jenn Feng Industrial Co., Ltd.
No. 19 Lane 118, Sec. 2 Min Tau Rd.
Ping Chang City, Taoyuan, Taiwan, R.O.C.

Judy Quan, Esq.
McCulloch Corporation
5000 Birch Street, Suite 4400
Newport Beach, CA 92660

Richard T. Coyne, Esq.
Wegman, Hessler & Vanderburg
6055 Rockside Woods Blvd., #200
Cleveland, Ohio 44131

Robert T. Moll
MTD Products Inc
P.O. Box 368022
Cleveland, OH 44136-9722

Phillip G. Clouse
MTD Southwest Inc
9235 S. McKemy
Tempe, AZ 85284

All Parties to the Consent Decree may change the address for providing notices to them by serving all other addressees identified above with a written notice setting forth the new address.

VI. CIVIL PENALTY

21. Defendants shall pay a civil penalty to the United States, in two equal installments, in the total amount of \$2,000,000, together with Interest on any amounts not paid within thirty (30) days of the Effective Date. The first payment, in the amount of \$1,000,000, shall be due no later than thirty (30) days after the Effective Date. The second payment, also in the amount of \$1,000,000, shall be due no later than ninety (90) days after the Effective Date. Defendants shall pay interest accrued from thirty (30) days after the Effective Date through the date of payment, at the rate established in accordance with 28 U.S.C. § 1961, on any portion of the civil penalty remitted more than thirty (30) days after the Effective Date.

22. Payment shall be made by Electronic Funds Transfer ("EFT") to the U.S. Department of Justice ("DOJ") in accordance with instructions to be provided to the Defendants following lodging of the Consent Decree by the Financial Litigation Unit of the U.S. Attorney's Office for the District of Columbia. Any EFT received at the DOJ lockbox bank after 11:00 a.m. Eastern Time will be credited on the next business day. Notice of the EFT shall simultaneously be mailed to the following:

Docket Clerk
Mailcode MS 2214A
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Jeffrey A. Kodish, Esq.
Office of Enforcement and Compliance Assurance
Mobile Sources Enforcement Branch
Western Field Office (8MSU)
U.S. Environmental Protection Agency
1595 Wynkoop Street
Denver, CO 80202

Chief
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
Reference DOJ Case No. 90-5-2-1-09103

Richard T. Coyne, Esq.
Wegman, Hessler & Vanderburg
6055 Rockside Woods Blvd., #200
Cleveland, Ohio 44131

Francis X. Lyons, Esq.
Bell, Boyd & Lloyd LLP
70 West Madison Street
Suite 3300
Chicago, Illinois 60602

23. At the time of payment, Defendant shall send a copy of the EFT authorization form and the EFT transaction record, together with a transmittal letter, which shall state that the payment is for the civil penalty owed pursuant to the Consent Decree in *United States v. McCulloch Corporation, et al.*, and shall reference the civil action number and DOJ case number 90-5-2-1-09103, to the United States in accordance with this Paragraph; by email to acctsreceivable.CINWD@epa.gov; and by mail to:

EPA Cincinnati Finance Office
26 Martin Luther King Drive
Cincinnati, Ohio 45268

24. If the Defendants fail to make the payment required within the time allotted by Paragraph 21, the payment is late. Late payment is subject to Interest and Stipulated Penalties as provided below.

25. The Defendants shall not deduct the payment required by Paragraph 21 in calculating its federal income tax.

26. The United States shall be deemed a judgment creditor for purposes of collection of the payment required by Paragraph 21.

VII. STIPULATED PENALTIES

27. The Defendants shall be liable for stipulated penalties to the United States for violations of this Consent Decree as specified below, unless excused under Section VIII (Force Majeure). A violation includes failing to perform any obligation required by the terms of this Decree according to all applicable requirements of this Decree and within the specified time schedules established by or approved under this Decree.

28. The following stipulated penalties shall accrue per violation per day for each violation of a requirement identified as follows:

a. For failure to make the payment required by Paragraph 21 of this Consent Decree when due: \$1,000 per day for each day that the payment is late during the first fifteen (15) days, and \$3,500 per day thereafter.

b. For failure to create, maintain, or provide copies of records or reports as required by this Consent Decree: \$750 per day for the first thirty (30) days of delay; \$1,000 per day for the next thirty days of delay; and \$1,500 per day for any delay beyond sixty (60) days.

c. For failure to timely export the Subject Chainsaws in accordance with Paragraphs 8 or 9 of this Consent Decree: \$200 per engine.

d. For failure by the applicable Defendant(s) to timely adopt or implement new and/or revised Nonroad Compliance Plans in accordance with Paragraphs 10 or 11 of this Consent Decree:

<u>For each violation</u>	<u>Penalty</u>
1st to 10th day	\$750 per day
11 th to 30 th day	\$1,250 per day
After 30 th day	\$2,000 per day

e. For failure to undertake and complete any of the Mitigation Projects in compliance with Paragraph 14 and Appendix G of this Consent Decree: \$1,250 per day per Mitigation Project during the first thirty (30) days, \$2,750 per day thereafter.

f. For failure by Jenn Feng and McCulloch to undertake and complete any of the Emissions Testing in compliance with Paragraphs 12 and 13 of this Consent Decree: \$1,000 per day during the first thirty (30) days, \$2,500 per day thereafter. The stipulated penalties set forth in this Paragraph 28(f) shall not apply to MTD.

g. For any other violation of this Consent Decree: \$1,000 per day.

29. Stipulated penalties shall continue to accrue as provided in Paragraph 28 of this Consent Decree during any Dispute Resolution, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of EPA that is not appealed to the Court, the Defendants shall pay accrued penalties determined to be owing, together with Interest, to the United States within thirty (30) days of the effective date of the agreement or the receipt of EPA's decision or order.

b. If the dispute is appealed to the Court and the United States prevails in whole or in part, the Defendants shall pay all accrued penalties determined by the Court to be owing, together with Interest, within sixty (60) days of receiving the Court's decision.

30. Subject to the provisions of Section XI (Effect of Decree) of this Consent Decree, the Stipulated Penalties provided for in this Consent Decree shall be in addition to any other rights, remedies, or sanctions available to the United States for the Defendants' violation of this Consent Decree or applicable law. Where a violation of this Consent Decree is also a violation of the Act, the Defendants shall be allowed a credit, for any stipulated penalties paid, against any statutory penalties imposed for such violation.

31. If a date by which the Defendants must meet any obligation of this Consent Decree falls on a holiday or weekend, the due date shall be the following working day. Stipulated penalties shall automatically begin to accrue on the first day the Defendants fails to satisfy any obligation or requirement of this Consent Decree and shall continue to accrue until the violation or deficiency is corrected. Stipulated penalties shall continue to accrue throughout any dispute resolution process. Stipulated penalties shall accrue simultaneously for separate violations of this Consent Decree.

32. Stipulated penalties shall be paid no later than thirty (30) days following the date that EPA sends to the Defendants a demand for payment of the stipulated penalties which have accrued to date together with an explanation of the basis for the demand. The Defendants shall pay stipulated penalties owing to the United States by EFT in accordance with Paragraph 22 of this Consent Decree or by certified or cashier's check in the amount due, payable to the "U.S. Department of Justice," referencing DOJ No. 90-5-2-1-09103 and the civil action number of this

case, and delivered to the office of the United States Attorney, District of Columbia, United States Attorney's Office, 555 4th Street, NW, Washington, D.C. 20530.

33. The Defendants shall not deduct stipulated penalties paid under this Section in calculating its federal income tax.

34. If the Defendants fail to pay stipulated penalties according to the terms of this Consent Decree, the Defendants shall be liable for Interest on such penalties.

35. Notwithstanding any other provision of this Consent Decree, the United States may, in its unreviewable discretion, waive any portion of a stipulated penalty that has accrued pursuant to this Consent Decree.

VIII. FORCE MAJEURE

36. A "force majeure event" is any event beyond the control of the Defendants, their contractors, or any entity controlled by the Defendants that delays the performance of any obligation under this Consent Decree despite the Defendants' best efforts to fulfill the obligation. "Best efforts" includes anticipating any potential force majeure event and addressing the effects of any such event (a) as it is occurring and (b) after it has occurred, preventing or minimizing any resulting delay to the greatest extent possible. "Force Majeure" does not include the Defendants' financial inability to perform any obligation under this Consent Decree.

37. The Defendants shall provide written notice, as provided in Paragraph 20 of this Consent Decree, within fourteen (14) days of the time the Defendants first knew of, or by the exercise of due diligence, should have known of, the event. The notice shall state: the anticipated duration of any delay; its cause(s); the Defendants' past and proposed actions to prevent or minimize any delay; a schedule for carrying out those actions; and the Defendants'

rationale for attributing any delay to a force majeure event. Defendant shall include with any notice all available documentation supporting the claim that the delay was attributable to a force majeure. Failure to provide written notice as required by this Paragraph shall preclude the Defendants from asserting any claim of force majeure. The Defendants shall adopt all reasonable measures to avoid or minimize such delay.

38. If the United States agrees that a force majeure event has occurred, the United States may agree to extend the time for the Defendants to perform the affected requirements for the time necessary to complete those obligations. An extension of time to perform the obligations affected by a force majeure event shall not, by itself, extend the time to perform any other obligation. Where the United States agrees to an extension of time, the appropriate modification shall be made pursuant to Section XIV (Modification) of this Consent Decree.

39. If the United States does not agree that a force majeure event has occurred, or does not agree to the extension of time sought by the Defendants, the United States' position shall be binding, unless the Defendants invoke Dispute Resolution under Section IX (Dispute Resolution) of this Consent Decree. In any such dispute, the Defendants bear the burden of proving, by a preponderance of the evidence, that each claimed force majeure event is a force majeure event, that the Defendants gave the notice required by Paragraph 37, that the force majeure event caused, or will cause, any delay the Defendants claim was, or is, attributable to that event, and that the Defendants exercised, or will exercise, best efforts to prevent or minimize any delay caused by the event.

40. An extension of one compliance date based on a particular event shall not automatically extend any other compliance date. The Defendants shall make an individual

showing of proof regarding the cause of each delayed incremental step or other requirement for which an extension is sought.

IX. DISPUTE RESOLUTION

41. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. The Defendants' failure to seek resolution of a dispute under this Section shall preclude the Defendants from raising any such issue as a defense to an action by the United States to enforce any obligation of the Defendants arising under this Decree.

42. Informal Dispute Resolution. Any dispute subject to Dispute Resolution under this Consent Decree shall first be the subject of informal negotiations. The dispute shall be considered to have arisen when the Defendants send the United States a written Notice of Dispute. Such Notice of Dispute shall state clearly the matter in dispute. The period of informal negotiations shall not exceed thirty (30) days from the date the dispute arises, unless that period is modified by written agreement. If the Parties cannot resolve a dispute by informal negotiations, then the position advanced by the United States shall be considered binding unless, within forty-five (45) days after the conclusion of the informal negotiation period, the Defendants invoke the formal dispute resolution procedures in Paragraph 43 of this Consent Decree.

43. Formal Dispute Resolution. The Defendants shall invoke formal dispute resolution procedures, within the time period provided in Paragraph 42 of this Consent Decree, by serving on the United States a written Statement of Position regarding the matter in dispute. The Statement of Position shall include, but may not necessarily be limited to, any factual data,

analysis, or opinion supporting the Defendants' position and any supporting documentation relied upon by the Defendants.

44. The United States shall serve its Statement of Position within forty-five (45) days of receipt of the Defendants' Statement of Position. The United States' Statement of Position shall include, but may not necessarily be limited to, any factual data, analysis, or opinion supporting that position and any supporting documentation relied upon by the United States. The United States' Statement of Position shall be binding on the Defendants, unless the Defendants file a motion for judicial review of the dispute in accordance with Paragraph 45 of this Consent Decree.

45. The Defendants may seek judicial review of the dispute by filing with the Court and serving on the United States, in accordance with Paragraph 20 of this Consent Decree, a motion requesting judicial resolution of the dispute. The motion must be filed within ten (10) days of receipt of the United States' Statement of Position pursuant to the Paragraph 44 of this Consent Decree. The motion shall contain a written statement of the Defendants' position on the matter in dispute, including any supporting factual data, analysis, opinion, or documentation, and shall set forth the relief requested and any schedule within which the dispute must be resolved for orderly implementation of the Consent Decree.

46. The United States shall respond to the Defendants' motion within the time period allowed by the Local Rules of this Court. The Defendants may file a reply memorandum, to the extent permitted by the Local Rules.

47. In any dispute brought under Paragraph 45 of this Consent Decree, Defendants shall bear the burden of demonstrating that their position clearly complies with and furthers the

objectives of this Consent Decree and the Act and that Defendants are entitled to relief under applicable law. The United States reserves the right to argue that its position is reviewable only on the administrative record and must be upheld unless arbitrary and capricious or otherwise not in accordance with law.

48. The invocation of dispute resolution procedures under this Section shall not, by itself, extend, postpone, or affect in any way any obligation of the Defendants under this Consent Decree, unless and until final resolution of the dispute so provides. Stipulated Penalties with respect to the disputed matter shall continue to accrue from the first day of noncompliance, but payment shall be stayed pending resolution of the dispute as provided in Paragraph 29 of this Consent Decree. If the Defendants do not prevail on the disputed issue, Stipulated Penalties shall be assessed and paid as provided in Section VII (Stipulated Penalties).

X. RIGHT OF ENTRY/RECORDS RETENTION

49. The United States, and its authorized representatives, upon presentation of appropriate credentials, shall have the right to enter any facility with information pertaining to this Consent Decree to:

- a. monitor the progress of activities required under this Consent Decree;
- b. verify any data or information submitted to the United States in accordance with the terms of this Consent Decree;
- c. obtain samples;
- d. obtain documentary evidence, including photographs and similar data; and
- e. assess Defendants' compliance with this Consent Decree.

50. Until three years after the termination of this Consent Decree, Defendants shall retain, and instruct their contractors and agents to preserve, in a form suitable for inspection, all non-identical records related to (a) the implementation of the Export Plans required by Paragraph 8 or 9 of this Consent Decree, (b) the implementation of Nonroad Compliance Plans required by Paragraph 10 or 11 of this Consent Decree, (c) implementation of Emissions Testing required by Paragraphs 12 and 13 of this Consent Decree; (d) the implementation of Mitigation Projects required by Paragraph 14 of this Consent Decree, and (e) other information gathered by Defendants to carry out the requirements of this Consent Decree. This information-retention requirement shall apply regardless of any contrary corporate or institutional policies or procedures. At any time during this information-retention period, upon request by the United States, Defendants shall provide copies of any documents, records, or other information required to be maintained under this Paragraph.

51. All information and documents submitted by the Defendants to the United States pursuant to this Consent Decree shall be subject to public inspection, unless identified and supported as confidential business information by the Defendants in accordance with 40 C.F.R. Part 2. Nothing herein shall be construed to require the Defendants to allow EPA access to documents protected by any applicable privilege.

52. At the conclusion of the information-retention period provided in Paragraph 50, each Defendant shall notify the United States at least ninety (90) days prior to the destruction of any documents, records, or other information subject to the requirements of the preceding Paragraph and, upon request by the United States, Defendant shall deliver any such documents, records, or other information to EPA. Defendant may assert that certain documents, records, or

other information is privileged under the attorney-client privilege or any other privilege recognized by federal law. If a Defendant asserts such a privilege, it shall provide the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of each author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Defendant. However, no documents, records, or other information created or generated pursuant to the requirements of this Consent Decree shall be withheld on grounds of privilege.

53. This Consent Decree in no way limits or affects any right of entry and inspection, or any right to obtain information, held by the United States pursuant to applicable federal laws, regulations, or permits, nor does it limit or affect any duty or obligation of a Defendant to maintain documents, records, or other information imposed by applicable federal or state laws, regulations, or permits.

XI. EFFECT OF DECREE

54. This Consent Decree resolves the United States' civil claims for penalties and injunctive relief under Sections 203, 204, 205, and 213 of the Act, 42 U.S.C. §§ 7522, 7523, 7524, and 7547 for the violations alleged in the Complaint filed in this action through the date of lodging. EPA's commitment under this Paragraph is expressly conditioned upon the satisfactory performance by Defendants of their obligations under this Consent Decree.

55. In consideration of the actions that will be performed by Defendants pursuant to Paragraph 14 of this Consent Decree (Mitigation Projects), EPA shall not base a determination under Section 207(c)(1) of the Act, 42 U.S.C. § 7541 and 40 C.F.R. § 90.808, that a substantial

number of the nonroad engines identified below do not conform to the regulations prescribed under Section 213 of the Act, 42 U.S.C. § 7524.

a. Subject Chainsaws; and

b. any engine family or group of nonroad engines identified in Paragraph 12 of this Consent Decree (Emissions Testing) that is determined to exceed the applicable emissions standards and for which the Defendants spend Additional Project Dollars to mitigate the excess emissions from the nonroad engines pursuant to Paragraph 14 of this Consent Decree (Mitigation Projects).

EPA's commitment under this Paragraph is expressly conditioned upon the satisfactory performance by Defendants of their obligations under this Consent Decree.

56. This Consent Decree does not limit or affect the rights of the Defendants against each other or against any third parties not party to this Consent Decree, nor does it limit the rights of third parties not party to this Consent Decree, against the Defendants, except as otherwise provided by law. Defendants reserve all rights against each other.

57. This Consent Decree does not limit or affect the rights of the United States against any third parties not a party to this Consent Decree.

58. This Consent Decree shall not be construed to create rights in, or grant any cause of action to, any third party not party to this Consent Decree.

XII. NON-WAIVER PROVISIONS

59. This Consent Decree in no way affects or relieves the Defendants of any responsibility to comply with any federal, state, or local laws or regulations, and compliance with

this Consent Decree shall be no defense to any actions commenced pursuant to said laws and regulations.

60. The United States reserves any and all legal and equitable remedies available to enforce the provisions of this Consent Decree.

61. This Consent Decree shall not limit any authority of EPA under the Act or any applicable statute, including the authority to seek information from the Defendants or to seek access to the property of the Defendants. The United States reserves all remedies available to it for violations of the Act by the Defendants that are not alleged in the Complaint as well as for violations of the Act by the Defendants that occur after the date of lodging of this Consent Decree.

62. This Consent Decree does not resolve criminal liability, if any, that any person might have for violations of the Act or any other law.

63. Nothing in this Consent Decree shall be construed to limit the authority of the United States to undertake any action against any person, including, in response to conditions that may present an imminent and substantial endangerment to the environment or to the public health or welfare.

XIII. COSTS OF SUIT

64. The Parties shall bear their own costs of this action, including attorneys' fees, except that the United States shall be entitled to collect the costs (including attorneys' fees) incurred in any action necessary to collect any portion of the civil penalty or any stipulated penalties due but not paid by the Defendants. Notwithstanding the above, Defendants do not

waive any claims against each other for indemnification and/or contribution which may include such costs and attorneys' fees.

XIV. MODIFICATION

65. The terms of this Consent Decree may be modified only by a subsequent written agreement signed by all the Parties. Where the modification constitutes a material change to any term of this Decree, it shall be effective only upon approval by the Court.

XV. PUBLIC COMMENT AND ENTRY OF CONSENT DECREE

66. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment. In accordance with Department of Justice policy, the United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations indicating that the Consent Decree is inappropriate, improper, or inadequate. This Paragraph does not create any rights exercisable by the Defendants.

67. The Defendants consent to the entry of this Consent Decree without further notice.

XVI. TERMINATION

68. The Defendants may, at any time after five (5) years from the Effective Date of this Consent Decree, serve upon the United States, together with all necessary supporting documentation, a Request for Termination of this Consent Decree stating that the Defendants have:

a. made the payment required by Paragraph 21 and any accrued Interest imposed by this Consent Decree;

- b. paid in full any stipulated penalties imposed by this Consent Decree; and
- c. completed all other requirements of this Consent Decree.

69. Following receipt by the United States of the Defendants' Request for Termination, the Parties shall confer informally concerning the Request and any disagreement that the Parties may have as to whether the Defendants have satisfactorily complied with the requirements for termination of this Consent Decree. If the United States agrees that the Decree may be terminated, the Parties shall submit, for the Court's approval, a joint stipulation terminating the Decree.

70. If the United States does not agree that the Decree may be terminated, the Defendants may invoke Dispute Resolution under Section IX (Dispute Resolution) of this Decree. However, the Defendants shall not seek Dispute Resolution of any dispute regarding termination until ninety (90) days after service of its Request for Termination.

XVII. SIGNATORIES/SERVICE

71. Each undersigned representative of the Defendants, EPA, and the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the Party he or she represents to this document. This Consent Decree may be signed in counterparts, and its validity shall not be challenged on that basis.

72. The Defendants agree not to oppose entry of this Consent Decree by the Court or to challenge any provision of the Decree, unless the United States has notified the Defendants in writing that it no longer supports entry of the Decree.

73. The Defendants agree to accept service of process by mail with respect to all matters arising under or relating to this Consent Decree and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable Local Rules of this Court including, but not limited to, service of a summons.

XVIII. INTEGRATION

74. This Consent Decree, including the Appendices identified or incorporated herein, constitutes the final, complete, and exclusive agreement and understanding between the Parties with respect to the settlement embodied in the Decree and supersedes all prior agreements and understandings, whether oral or written, concerning the settlement embodied herein. Other than the Decree (including the Appendices), no other document, nor any representation, inducement, agreement, understanding, or promise, constitutes any part of this Decree or the settlement it represents.

XIX. FINAL JUDGMENT

75. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment of the Court as to the United States and the Defendants.

XX. RETENTION OF JURISDICTION

76. This Court shall retain jurisdiction of this matter for the purposes of implementing and enforcing the terms and conditions of this Consent Decree and for the purpose of adjudicating all disputes among the Parties that may arise under the provisions of this Consent Decree, to the extent that this Consent Decree provides for resolution of disputes by the Court.

XXI. APPENDICES

77. The following appendices are attached to and incorporated into this Consent

Decree:

“Appendix A” is the List of Subject Chainsaws,

“Appendix B” is the MTD Inventory Tracking and Export Plan,

“Appendix C” is the Jenn Feng/McCulloch Inventory Tracking and Export Plan,

“Appendix D” is the Jenn Feng and McCulloch Nonroad Compliance Plan,

“Appendix E” is the MTD Nonroad Compliance Plan,

“Appendix F” is the Jenn Feng and McCulloch Test Plan, and

“Appendix G” is the description of Mitigation Projects.

SO ORDERED AND APPROVED in accordance with the foregoing this ____ day of

_____, 2008.

United States District Judge

**Signature Page – United States v McCulloch Corporation, Jenn Feng Industrial Co. Ltd.
and MTD Products Inc**

FOR PLAINTIFF, UNITED STATES OF AMERICA

RONALD J. TENPAS
Assistant Attorney General
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Dated 4/18/08

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Dated 4/2/08

**Signature Page – United States v McCulloch Corporation, Jenn Feng Industrial Co. Ltd.
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Dated: April 9, 2008

GRANT Y. NAKAYAMA
Assistant Administrator
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dated: March 14, 2008

ADAM M. KUSHNER
Director
Air Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
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Dated: 2/29/08

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**Signature Page – United States v McCulloch Corporation, Jenn Feng Industrial Co. Ltd.
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FOR DEFENDANT, JENN FENG INDUSTRIAL CO. LTD.

~~DAVID JONG~~

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Dated: Feb. 25, 2008

~~FRANCIS X. LYONS, ESQ.~~
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Dated: 28 Feb, 2008

**Signature Page – United States v McCulloch Corporation, Jenn Feng Industrial Co. Ltd.
and MTD Products Inc**

FOR DEFENDANT, McCULLOCH CORPORATION

Dated: Feb. 25, 2008


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Dated: 28 Feb, 2008

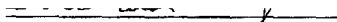
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Signature Page – United States v McCulloch Corporation, Jenn Feng Industrial Co. Ltd.
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FOR DEFENDANT, MTD PRODUCTS INC


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Dated: 3/12/08


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Dated: 3/13/08

**Signature Page – United States v McCulloch Corporation, Jenn Feng Industrial Co. Ltd.
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Dated: 3-11-08